BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH MOYER, Claimant, vs. INTERSTATE POWER & LIGHT COMPANY, Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	FILED NOV 15 2018 WORKERS' COMPENSATION File No. 5047944 APPEAL DECISION Head Note Nos: 1803; 1803.1; 3200; 5-9999

Claimant Joseph Moyer appeals from an arbitration decision filed on March16, 2017. Defendant Interstate Power & Light Company, self-insured employer, cross-appeals. Defendant Second Injury Fund of Iowa responds to the appeal. The case was heard on August 8, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 7, 2016.

In the arbitration decision, the deputy commissioner found that the March 20, 2012, work injury caused 15 percent permanent impairment to claimant's right leg. The deputy commissioner also found, among other things, that claimant failed to carry his burden of proof that the August 29, 2006, left leg injury is a qualifying first injury under Iowa Code section 85.64. The deputy therefore found that claimant is not entitled to Second Injury Fund benefits.

Issues

1) Whether the August 29, 2006, injury is a qualifying first injury under Iowa Code section 85.64 and Second Injury Fund benefits are applicable, and if so, the extent thereof.

2) The extent of permanent partial disability applicable to the March 20, 2012, work injury and whether that injury is to the right foot or the right leg.

3) Whether defendant-employer is obligated to pay permanent partial disability benefits once they have commenced, without interruption for temporary benefits.

Finding of Facts and Conclusions of Law

Claimant asserts that the first injury of August 29, 2006, is a qualifying injury under Iowa Code section 85.64 and that he is entitled to Second Injury Fund benefits having sustained industrial disability in the range of 60 to 70 percent. Concerning the second injury alone, claimant argues that the applicable permanent impairment should be 26 percent to the right lower extremity per Robin Sassman, M.D.'s evaluation, not 15 percent as assigned by Erin Kennedy, M.D., which was adopted by the deputy commissioner.

Defendant-employer asserts that concerning the second injury of March 20, 2012, involving the right leg, the deputy commissioner correctly found claimant sustained 15 percent permanent partial disability. However, defendant-employer also cross-appeals arguing that the permanent impairment from the March 20, 2012, work injury should be limited to the right foot and not extend to the right leg. Defendant employer further argues relying upon the remand decision in Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 374, File No. 5038367 (Iowa 2016)(Remand Decision, February 3, 2017), that permanency benefits should not overlap temporary total/healing period benefits.

The Second Injury Fund of Iowa did not appeal, but asserts in response that the deputy commissioner correctly found the August 29, 2006, injury was not a qualifying first injury under Iowa Code section 85.64, and, if the commissioner finds claimant is entitled to receive Second Injury Fund benefits, claimant has failed to prove entitlement to extensive industrial loss.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I adopt the findings of the deputy commissioner and I affirm the arbitration decision in its entirety with the following additional analysis.

Entitlement to Second Injury Fund Benefits

This case involves a primary issue of whether claimant's August 29, 2006, injury is a qualifying injury under Iowa Code section 85.64.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6). In this case claimant carries the burden of proving by a preponderance of the evidence that the first injury of August 29, 2006, is a qualifying injury under Iowa Code section 85.64.

Iowa Code section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain

a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

The first injury of August 29, 2006, to claimant's left leg is based on a surgery with Scott Schemmel, M.D., which was an arthroscopic chondroplasty of claimant's left patella. The post-operative diagnosis was left knee grade 3 articular surface lesion of the undersurface of the patella. (Exhibit 11, pages 15-16)

Claimant argues that his post injury symptoms, along with the restrictions and impairment rating assigned by Dr. Sassman, support a finding of a loss of use of the left leg and therefore, the August 29, 2006, injury is a qualifying first injury under Iowa Code section 85.64. I will address these arguments individually:

First, considering the post-injury symptoms, claimant testified that after the August 29, 2006, surgery, his left knee was "[f]or the most part okay . . . ." (Transcript p. 74) However, he would develop stiffness and soreness if he had to do "a lot of stairs," and he had difficulty with kneeling and crouching due to both knees. (Tr. pp. 75, 123) He further testified that he quit playing softball after this injury, and that some jobs required him to regularly travel between floors, and that when that occurred, he took the elevator when possible to avoid the stairs. (Tr. p. 75) Claimant also complained of difficulty using stairs at the time of his IME with Dr. Sassman on February 9, 2015, along with occasional pain and short-term stiffness after prolonged kneeling. (Ex. 13, p. 2)

The deputy commissioner found claimant's testimony was "clear and consistent" with the evidentiary record, and that his demeanor was "excellent" and "gave [the deputy commissioner] no reason to doubt claimant's veracity." (Arbitration Decision p. 2) The deputy found claimant to be credible. (Id.)

Because claimant's description of his symptoms is unrebutted and the deputy commissioner found claimant's testimony to be credible, I accept claimant's testimony that he had some continued symptoms with his left knee post-surgery.

However, the mere presence of post-injury symptoms alone does not necessarily establish a previous loss of use or permanent disability required by Iowa Code section 85.64 to establish a qualifying first injury.

Second, considering the restrictions assigned by Dr. Sassman for the August 29, 2006, injury to the left knee, the deputy concluded that the record does not support the

assigned restrictions. I agree that Dr. Sassman's restrictions for the left knee are not supported by the record as a whole. The restrictions assigned by Dr. Sassman include limiting kneeling and squatting to a rare basis, and if kneeling is required, she recommended claimant use a knee pad. (Ex. 13, p. 4) It is significant that a primary complaint of claimant's left knee condition is related to using stairs and Dr. Sassman did not assign any restrictions for avoiding or limiting the use of stairs.

After being released to return to work following the August 29, 2006, surgery, claimant returned to work in physically demanding positions with no restrictions and he did not seek any additional medical care. Also, claimant underwent an FCE in 2015, which found he had the ability to kneel without any limitations. The same FCE also found claimant could repetitively squat on an occasional basis, which was distinguished from the simple non-repetitive squatting described in Dr. Sassman's restrictions. It is of particular significance that the limitations determined by the 2015 FCE related primarily to claimant's right forefoot symptoms, not the left knee. The therapist conducting the FCE stated that the "limitations predominately are due to his decreased tolerance due to right forefoot pain resulting in altered mechanics of progressive weightbearing [sic] through his heel transitioning to his lateral foot resulting in increased lateral subtalar joint abnormal forces." (Ex. 14, p. 5) The FCE does not indicate claimant had any difficulty with kneeling or squatting due to his left knee condition. In fact, during repetitive squatting, claimant progressively "increased left lower extremity weightbearing [sic] as squatting repetitions progressed." (Ex. 14, p. 8) Further, while doing deep static crouching claimant demonstrated normal weightbearing [sic] on the left. (Id.) Also, claimant's range of motion of his left knee was found to be normal. (Ex. 14, p. 11)

I agree with the deputy that the restrictions assigned by Dr. Sassman are not supported by the record in this matter.

Third, considering the ten percent impairment rating assigned by Dr. Sassman, the rating is based on cartilage intervals observed on an x-ray taken on or about February 9, 2015, at the time of the IME. (Ex. 13, p. 4) The x-ray was taken over 9 years after the first injury and nearly 3 years after the second injury. There was no other x-ray available for comparison after the August 29, 2006, surgery. The Fund argues that the nearly three year gap in time between the second injury and the x-ray, makes it impossible to know when the cartilage interval developed and therefore when the alleged permanent disability and loss of use occurred, whether before or after the second injury. Because of this lack of evidence, the Fund argues claimant has failed to carry his burden of proof that he sustained a prior loss of use and therefore, the 2006 left knee injury is not a qualifying injury under Iowa Code section 85.64.

Claimant admits in his appeal brief that Dr. Sassman does not specifically state that the functional impairment she assigned was caused by the 2006 left knee injury, but claimant argues that the IME report taken as a whole "makes it clear that she was assessing the extent of loss from the first injury . . . ." (Claimant's Appeal Brief, p. 18) This argument is based in part on Dr. Sassman's review of the history of the injury and statement that claimant's post-injury symptoms have continued. (Ex. 13, pp. 1-2)

However, this does not address the question of whether the cartilage interval observed on the February 9, 2015, x-ray pre-dated the March 20, 2012, injury, nearly three years earlier.

Claimant bears the burden of proof that the first loss must result in permanent disability and the cumulative effect of both the first and second injuries combine to produce a greater degree of industrial loss than that which is attributable to the second injury alone. Haynes v. Second Injury Fund, 547 N.W.2d 11, 14 (Iowa Ct. App. 1996); Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 469 (Iowa 1990); Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994).

The statute in question states:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member . . . the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability.

Iowa Code section 85.64(emphasis added)

A plain reading of the statute requires a showing that the prior loss of use was a preexisting disability before the latter injury occurred. Therefore, before the first injury can be said to be a qualifying injury under the statute, claimant must show that the loss of use preexisted the second injury.

The deputy commissioner found Dr. Sassman failed to offer a specific opinion that the condition shown in the February 9, 2015, x-ray preexisted the second injury and was causally related to the 2006 injury. I agree with the deputy commissioner and I conclude that the impairment rating provided by Dr. Sassman is insufficient to establish a functional impairment or loss of use of the left leg prior to the March 20, 2012, injury.

Claimant also argues that the deputy's determination that the first injury was not a qualifying injury under Iowa Code section 85.64 is contrary to the Commissioner's Appeal decision in Block v. Second Injury Fund of Iowa, File No. 5044550 (Appeal Decision, Sept. 16, 2015). In that case the Second Injury Fund argued, as they do here, that a qualifying first injury must "tend to act as a hindrance to the individual's ability to obtain or retain effective employment." Block, File No. 5044550, p. 5. The Second Injury Fund relied upon Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978) I disagree that the deputy commissioner's conclusion that the first injury is not a qualifying injury under section 85.64 is contrary to the commissioner's conclusion in Block. I disagree because in Block, there is a fundamental difference in the facts compared to this case. In Block, it was found that "Dr. Kuhnlein opined that prior to the right knee work injury [the second injury] claimant had 33 percent impairment of the left lower extremity for his left knee [the first injury]." Block, No. 5044550, at p. 3. Although

there are other similar facts between Block and this case, such as claimant's return to heavy work, no additional medical care and no contemporaneous permanent restrictions associated with the first injury, the glaring distinction between the two cases is that there is a clear expert opinion in Block that the permanent impairment pre-dated the second injury. That evidence is missing in this case.

The Fund argues in this case that claimant must prove the first and second injuries "combine to contribute to the claimant's alleged industrial loss." (Second Injury Fund Appeal Brief, p. 5) The Fund agrees in their brief that the deputy concluded that claimant "failed to prove by a preponderance of the evidence that he sustained a qualifying first injury entitling him to Fund benefits, because Moyer failed to prove his left knee injury contributed to any degree of industrial loss . . . ." (Id.)

Claimant states the Fund's argument amounts to a requirement that the first injury caused an independent industrial loss by a showing that the first injury "must tend to act as a hindrance to the individual's ability to obtain or retain employment," and that this is based on language found in Anderson v. Second Injury Fund, 262 N.W.2d 789, 791. (Claimant's Brief, p. 13) Claimant states that this argument has been previously rejected by the Commissioner in Block. In Block, the commissioner concluded that the language in Anderson that is now relied upon by the Fund "was to demonstrate the background and purpose of Second Injury Fund laws in general. It was not meant to suggest that the terms 'loss of use' as used in the first sentence of Iowa Code section 85.64 meant more than just functional loss." Block, at p. 6. I agree that the term loss of use means only a functional loss.

While it is true that the first injury must contribute to the cumulative effect of the two injuries to determine the extent of benefits to which the claimant is entitled, there is no requirement under section 85.64 that claimant prove industrial loss of the first injury in order for it to be a qualifying injury. Claimant need only prove the three elements identified in the statute and discussed in Shank above, which are: a prior loss of use of a hand, arm, foot, leg, or eye; a subsequent loss of use of another such member or organ through a compensable work injury; and, some permanent disability from the injuries. Shank, 516 N.W.2d 808, 813 (Iowa 1994). After the two injuries have been deemed to be qualifying injuries, then it is appropriate to address the cumulative effect of both the first and second injuries, and determine whether they combine to produce a greater degree of industrial loss than that which is attributable to the second injury alone. If so, the Fund is liable for the excess beyond the functional loss attributable to both injuries. Haynes v. Second Injury Fund, 547 N.W.2d 11,14 (Iowa Ct. App. 1996); Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 469 (Iowa 1990); Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994). If the combined industrial disability does not exceed the functional loss, then even though the injuries may be said to be "qualifying" injuries, the Fund has no liability. However, given my findings considering claimant's failure to prove a prior loss of use regarding the first injury, this issue is moot.

Claimant further argues that expert medical evidence is not necessarily needed to establish permanency of an injury. Claimant argues that the mere fact that claimant underwent surgery for the left knee should be an independent basis for finding a preexisting permanent impairment and loss of use predating the March 20, 2012, work injury. (Claimant's Brief, p. 17) However, I note Dr. Sassman did not assign any permanent impairment for the surgical procedure. In Block, the Commissioner concluded that the prior surgery itself, was an independent basis for a 2 percent permanent partial disability rating under the AMA Guides. This type of evidence is lacking in this case.

The deputy commissioner found that although claimant testified credibly of some ongoing symptoms concerning the left knee, he failed to prove by a preponderance of the evidence that the left knee condition resulted in a loss of use of the left leg preexisting the March 20, 2012, second work injury and he is not entitled to benefits from the Fund. I agree on the basis that claimant failed to carry his burden of proof that he sustained a loss of use prior to the March 20, 2012, second injury. Therefore, I affirm the conclusion of the deputy commissioner that the 2006 left knee injury is not a qualifying injury for purposes of Iowa Code section 85.64.

Claimant also argues he should be awarded industrial disability benefits in the range of 60 percent to 70 percent, which assumes claimant is entitled to Fund benefits. However, I agree with the deputy commissioner that the first injury is not a qualifying injury for purposes of Fund Benefits and therefore, the issue of the extent of industrial disability is moot.

Extent of Impairment – March 20, 2012 Right Leg Injury

Concerning the question of the extent of impairment of the March 20, 2012, right leg injury, claimant argues that the deputy commissioner should have relied upon Dr. Sassman's assessment of functional impairment for the second injury of 26 percent impairment of the right lower extremity, rather that Dr. Kennedy's assessment of 15 percent impairment of the right lower extremity. For the reasons stated by the deputy commissioner, I agree that the opinion of Dr. Kennedy is more persuasive and I accept that opinion.

Defendant-employer argues that the deputy commissioner should have utilized Dr. Kennedy's 21 percent impairment rating of the foot (31.5 weeks) rather than the 15 percent impairment rating of the leg (33 weeks). Defendant-employer argues that the anatomical site where permanent impairment exists is the foot and involves the nerves at the front of the foot and fractured toes. However, claimant underwent a surgical partial release of the gastrocnemius tendon in his second surgery with Phinit Phisitkul, M.D. Nevertheless, defendant-employer argues there is no medical opinion relating this procedure to the work injury and there was no permanent impairment assigned for this procedure or part of the leg or ankle. Also, claimant denied any symptoms in the area of his calf. (Tr. p. 119) Defendant-employer admits in their brief that the surgery was on the "tendon in his right leg." (Defendant-Employer Brief, p. 9)

I agree with the conclusion of the deputy commissioner that impairment of the leg is properly selected over the impairment of the foot. In support of this conclusion, I find that the surgery described as an endoscopic gastrocnemius recession was performed with portals in mid-calf area and the gastrocnemius tendon was partially released to address the equinus gastrocnemius contracture and equinus deformity of the foot. (Ex. 4, p. 89-91) The surgery involved a partial severing of the gastrocnemius tendon to weaken that tendon in order to release the equinus gastrocnemius contracture and foot deformity. Therefore, the injury has invaded the leg and no longer resides only in the foot. In addition, the permanent impairment assigned by defendant-employer's physician, Dr. Kennedy is not based on the specific region of the foot or even the ankle. (Ex. 18, p. 18-19) Rather it is based on impairment to the peripheral nervous system, including, but not limited to, the superficial peroneal nerve, which includes, according to the figures included in Dr. Kennedy's IME report, an area of the foot, ankle and lower leg. (Ex. 18, pp. 20-22) Therefore, I affirm the deputy commissioner's finding that the situs of the injury and permanent impairment involves the lower extremity, not just the foot.

Payment of PPD benefits relative to temporary benefits

The final issue presented by defendant-employer is an argument that permanent partial disability (PPD) benefits and temporary total/healing period benefits do not overlap based on the remand decision in Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 374, File No. 5038367 (Iowa 2016)(Remand Decision, February 3, 2017). The Supreme Court in Evenson concluded that the "obligation to pay PPD benefits cannot be delayed until after the TPD benefits subsequently terminated under the plain meaning of section 85.34." Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 374 (Iowa 2016) The Supreme Court further stated that "[t]he date of Evenson's first return to work established the end of the healing period and the commencement of PPD benefits because it was the earliest of the three triggering events prescribed in section 85.34(1)" of the Iowa Code. Evenson, at 372. The Court reasoned that their "conclusion that Evenson's entitlement to PPD benefits was not suspended beyond the end of the first healing period until after his period of temporary partial disability ended poses no risk of duplication or overpayment," because temporary benefits are calculated to replace loss of actual income while permanent partial disability benefits are owed for a different loss, which is the permanent partial loss of the body part in question. Evenson, at 374. Therefore, based on the decision by the Supreme Court, I affirm the decision of the deputy commissioner that once permanent partial disability benefits are commenced, they "are not interrupted by subsequent payment of temporary disability benefits." (Arbitration Decision, pp. 20-21)

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of March 16, 2017, is affirmed in its entirety with the above additional analysis.

Defendant-employer shall pay claimant thirty-three (33) weeks of permanent partial disability benefits commencing November 8, 2012, at the weekly rate of eight hundred sixty-six and 74/100 dollars ($866.74).

Defendant-employer shall receive a credit for all benefits previously paid.

Defendant-employer shall pay accrued weekly benefits in a lump sum.

Defendant-employer shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

As ordered in the arbitration decision, although not an issue in this appeal, defendant-employer shall pay claimant's prior medical expenses and medical mileage submitted by claimant at the hearing as set forth in the arbitration decision.

Claimant shall take nothing from the Second Injury Fund of Iowa.

Pursuant to rule 876 IAC 4.33, defendant-employer shall pay claimant's costs of the arbitration proceeding in the amount of five hundred forty-nine and 95/100 dollars ($549.95), as set forth in the arbitration decision, claimant and defendant-employer shall split the costs of the appeal, including the cost of the hearing transcript, and no costs are taxed to defendant-Second Injury Fund of Iowa.

Pursuant to rule 876 IAC 3.1(2), defendant-employer shall file subsequent reports of injury as required by this agency.

Signed and filed on this 15th day of November, 2018.

Joseph S. Cortese II

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